



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

COURTS MARTIAL.*

I WILL not endeavor to go into a discussion of the theory of military law nor even into a discussion of its general principles, but will confine the scope of this article to a discussion of the every-day administration of military law in the military forces of the United States. To those interested enough to pursue the course further I commend what seems to the writer the most complete and compact law book on any subject—*Manual for Courts Martial, U. S. Army*. Quoting from this book:

“Military Law is the legal system that regulates the Government of the military establishment. It is a branch of the municipal law, and in the United States derives its existence from special constitutional grants of power. It is both written and unwritten. The sources of military law are the articles of war enacted by Congress, Aug. 29th, 1916, other statutory enactments relating to the military service, the army regulations, and general and special orders and decisions promulgated by the War Department and by department, post and other commanders.”

The three classes of military tribunals are: (a) Military commissions and Provost Courts for the trial of offenders against the laws of war and under martial law; (b) Courts Martial, general, special and summary, for the trial of offenders against military law; (c) Courts of Inquiry for the examination of transactions or of accusations or imputations

*The writer's present environment offers strong contrast to that in which his last article for your magazine was written. From a sumptuous Bar Association library on the tenth floor of a new skyscraper in a prosperous middle western city to the flapping walls of a 9x9 tent with a busy little air-tight heater trying to combat a freezing norther that sings through the pines of a sunny (?) southern camp is (pardon the pun), “some come down.” Certainly one could wish for more quiet and undisturbed surroundings and when we re-read the chaotic stuff we've written, there arises the suspicion that seems to suggest a solution to a mystery that has long puzzled the bar—perhaps our State Courts of Appeal write their opinions in a tent on a winter night with the thermometer registering what the artilleryman calls a “Graze Short.”

against officers or soldiers. It is with class "b," Courts Martial, that we will deal.

A General Court Martial consists of from five to thirteen officers. When the court has been for any reason reduced below five, the judge advocate reports the fact to the appointing authority, who in turn designates officers to fill the vacancies. General Courts are ordinarily appointed and convened in a mobilized division or army corps by the Division or Corps Commander, in other cases by the Department Commander, although the authority to appoint General Courts Martial is also vested in the President and, under certain circumstances, in other commanders.

The Judge Advocate, who is usually the lowest ranking officer of that Court, performs the combined duties of a prosecuting attorney, court clerk and sheriff. General Courts try cases corresponding in importance with felony cases in civil courts and all charges against commissioned officers. General Courts have jurisdiction to try all persons subject to Military Law for all crimes made punishable by the Articles of War, and to try all persons subject to trial by Military Tribunals for violation of the Laws of War.

The extent of its jurisdiction over persons not a part of the military organization is a subject too broad for treatment here.

Special Courts Martial consist of from three to five officers, and are ordinarily appointed by Regimental Commanders, though they may be appointed by higher authorities and by the commander of a detached battalion or other command. Their jurisdiction is in the main intermediate between the General and Summary Court. They have jurisdiction over all persons subject to military law, except officers and certain classes excepted by the President, and over all crimes and offenses (not capital), punishable under the Articles of War. A Special Court may not adjudge dishonorable discharge, confinement in excess of six months, or forfeiture of more than six months' pay.

Summary Courts Martial try by far the greatest number of military offenses. They correspond in large measure to police courts in civil law. They consist of one officer, appointed by

the Regimental Commander or by the Commanding Officer of a detached battalion, company, or other detachment. A Summary Court may be appointed by a higher commander.

It will be noted that: (a) General Courts Martial are appointed by commanders of divisions or higher units; the commanding officer of a separate brigade and, when so empowered by the President, the commanding officer of any force, or body of troops, or district may appoint. (b) Special and Summary Courts Martial must be appointed by the commanding officer of a regiment or higher unit, except that the commanding officer of a detached battalion or other command may appoint.

Summary Courts have jurisdiction over all persons subject to military law, except officers, cadets, non-commissioned officers who object thereto, and persons belonging to a class excepted therefrom by the President. They may not adjudge confinement in excess of three months, or forfeiture of more than three months' pay, or dishonorable discharge. All Courts Martial are criminal courts entirely—they have no civil jurisdiction.

The proceedings are instituted by filing charges, corresponding to a warrant or indictment at civil law. The charges are divided into two parts, the technical charge or statement of the Article of War violated, and the specification or statement of the facts constituting the offense, for example:

Charge: Violation of the 86th Article of War.

Specification (1) In that Private John Smith, being on guard and posted as a sentinel in time of war at Camp Shelby, Miss., on or about the 21st day of December, 1917, was found sleeping on his post.

JAMES JONES,
Capt. 675th Inf.,
Officer Preferring Charges.

Charges may be preferred by a civilian, an enlisted man or an officer. However, it is the practice to have all charges preferred by a commissioned officer, the civilian or enlisted man furnishing to the officer a sworn statement of the facts on which the charges are based.

These charges are prepared in triplicate and must be accom-

panied, except when trial is to be had by a summary court, by a statement of the substance of the testimony expected from witnesses, both for the prosecution and defense, and all other available information as to any other probable testimony that may be developed. They must also be accompanied, in case of a soldier, by duly authenticated evidence of former convictions for offenses committed by him during his current enlistment, and within one year next preceding the date of the alleged commission of the offense with which he is charged.

The charges when prepared are forwarded by the officer preferring the charges to the officer empowered to appoint a Summary Court in the command to which the accused belongs or pertains. If the officer, exercising Summary Court jurisdiction, decides the offense is one to be tried by Summary or Special Court, he refers the charges to the proper Summary or Special Court.

If the officer exercising Summary Court jurisdiction over the command to which accused belongs or pertains decides that the case is one that should be tried by General Court Martial he forwards the charges to the next superior commander, first, however, having carefully investigated the charges, or caused them to be investigated by some officer other than the one preferring the charges, and having attached to the papers an indorsement stating the name of the officer who investigated the charges, the opinion of both such officer and himself as to whether the charges can be sustained by proof, the substance of any material statement made by the accused (or, if the accused desires to submit no statement, such fact will be noted), a summary of extenuating circumstances, if any, and his recommendation of action to be taken.

The trial proceeds substantially as the trial of criminal cases in civil courts, except for a greater relaxation of the rules of evidence, which undoubtedly enables the Courts Martial to get at the real facts more accurately than the civil courts. However, there is a great deal of apparently useless and senseless delay in the organization of the General and Special Courts, and also in the preliminaries to the trial. For instance, before the trial of each case the order appointing the court and all

subsequent orders changing the personnel of the court must be read in the presence of the whole court, and the accused; the whole court must be sworn by the Judge Advocate, the Judge Advocate sworn by the President of the Court, and the Reporter sworn by the Judge Advocate. There seems to be no reason why the court and Judge Advocate could not be sworn, as civil courts are upon appointment, to try all cases which might come before it. Nor does any real purpose seem to be served by reading all the orders appointing the court and changing its personnel. It should be presumed that the court was duly appointed and that fact of course could be verified, if questioned, by recourse to the orders.

A feature of Court Martial trials is that after the Judge Advocate and counsel for accused have examined a witness, the court takes him in hand and examines him at great length, usually each member questioning at some length. This results in another delay, for usually a great deal of the evidence is gone over several times. The most serious objection to this practice is in the fact that if the witness is somewhat difficult or antagonistic, the member of the court who is questioning involuntarily becomes antagonistic also, and involuntarily is prejudiced for or against the accused, according to the side for which the witness is testifying. Often such questioning by the court is due in large measure to the failure of the Judge Advocate to properly bring out the facts. The Judge Advocate is seldom a man who has received any special training in his duties or usually has not had much trial experience. His Court Martial duties are in addition to his other military duties. It would seem that there should be a Judge Advocate, at least, for every Brigade, who has no other military duties and who has received especial training as a Judge Advocate. Then the cases before General and Special Courts Martial would be better prepared and more expertly, efficiently and expeditiously handled. A great deal of the valuable time of officers, which they could use advantageously in training themselves and their men, is wasted in sitting on General and Special Courts, while the Judge Advocate reads numerous appointive orders, swears the court over and over again, and stumbles through a half-prepared case that he

does not know how to handle. These remarks refer to line and staff officers, usually detailed to act as Judge Advocates, not to members of the Judge Advocate General's Department, who simply supervise the preparation of records and assist the appointing authority in reviewing records. Another serious cause of delay in Courts Martial is due to the fact that on every legal point raised, for instance a point involving the admissibility of evidence, the court must be closed, every one cleared out except the members of the court, a vote taken as to what the ruling should be, the court opened again and its ruling announced. One more cause for delay may be noticed. The accused, no matter how able his counsel is, is not allowed to waive any formality. The word "waive" is unknown in Courts Martial.

It is not to be thought from these statements that the courts are inefficient or unfair in the least. They have the virtues of a jury trial without the most serious objections to the jury system. On a Court Martial, the same men are judges and jury, and everyone is experienced in handling the kind of men they try, understands their psychology, and knows the elements of the offenses without the necessity for instructions. Moreover, after nineteen months of practically continuous service on General Courts Martial, I cannot recall a case in which I do not think the findings and sentence of a majority of the court were not manifestly correct and fair, both to the accused and to the necessities of military service, and free from the slightest prejudice of any kind.

The accused is, of course, entitled to counsel of his own choosing, either military or civilian. Should the accused request appointment of an officer at the station where the court sits, who is not a member of the court, the commanding officer will appoint such officer counsel, if he is reasonably available.

After all the evidence has been introduced and the arguments have been made, if either side desires to make any, the court is closed and a vote taken, beginning with the junior officer in rank, on each specification and charge. The court is then reopened and the record of service and former convictions is read, the court is then again closed and a sentence voted upon. The method of arriving at a sentence is for each member of the

court to write on a slip of paper a proposed sentence. The sentences thus proposed are voted upon, beginning at the lowest sentence proposed. As soon as a sentence receives a majority of the votes cast, the court is reopened, and the Judge Advocate advised. Neither accused, his counsel, nor anyone other than the members of the court and Judge Advocate are advised of the findings or sentence of the court until it has been reviewed by the appointing authority, and acted upon by him.

Findings and sentence are fixed by majority vote of the court, except that in cases where the death penalty is mandatory no person shall be convicted, except by vote of two-thirds of the court. Where the death penalty is discretionary a conviction may be determined by majority vote, but the death penalty cannot be imposed without concurrence of two-thirds of the members. No sentence of a Court Martial can be carried into execution until it has been approved by the officer appointing the court or by the officer commanding for the time being. The sentence cannot be increased by the reviewing authority nor by any other officer. It may be mitigated or remitted in whole or in part by the reviewing authority. However, the reviewing authority, if satisfied that the sentence is inadequate, often refers the proceedings back to the court with the suggestion that it revise the sentence and with an indorsement to the effect that the sentence is deemed inadequate. Since the court has had an opportunity to examine the witnesses face to face and to notice their bearing and demeanor, it usually refuses to revise its sentence. Sometimes, however, the court does revise and increase the sentence.

The reviewing authority, which is, as we have stated, also the appointing authority, having approved the findings and sentence of the court, makes an order to that effect and publishes the findings and sentence.

In this outline I have not attempted to go fully into details and have necessarily omitted exceptions to the general rules. It has only been attempted to hastily sketch the general rules and practice of the every day administration of law in the military forces.

Ellerbe W. Carter,
Capt. 138th F. A.

FORMERLY OF LOUISVILLE, KY., BAR.